IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ENERGY AUTOMATION SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 3-06-1079**
	)	
XCENTRIC VENTURES, LLC, d/b/a BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP-OFF REPORT and/or RIPOFFREPORT.COM, and EDWARD MAGEDSON a/k/a ED MAGEDSON,	)	**Judge Aleta Trauger** **Magistrate Judge Juliet Griffin**
	)	**JURY DEMAND**
	)	
Defendants.	)	

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO LIFT STAY ON DISCOVERY FOR LIMITED PURPOSE OF DISCOVERING JURISDICTIONAL FACTS

Plaintiff Energy Automation Systems, Inc. ("EASI") submits this Reply in support of its Motion to Lift the Stay on Discovery for the Limited Purpose of Discovering Jurisdictional Facts. (Doc. No. 31.) The Court should grant EASI's motion and permit EASI to take discovery related to jurisdictional issues.

I. INTRODUCTION

EASI filed its Complaint and Amended Complaint, alleging facts sufficient to justify this Court's exercise of personal jurisdiction over Defendant Xcentric Ventures, L.L.C.'s ("Xcentric"). Xcentric then moved to dismiss the Amended Complaint based on a claimed lack of personal jurisdiction. In its original motion, Xcentric blurs the distinction between Rule 12, Rule 56 and Rule 11. EASI responded to that motion and, even without the aid of discovery,

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cited ample facts to establish both general and specific personal jurisdiction. Prior to filing its Response, EASI also requested that Xcentric agree to discovery related to the jurisdictional issues, but Xcentric refused. EASI then sought leave of Court to take that discovery.

The issue before the Court in the instant motion is whether this Court should lift the stay to permit EASI to take discovery on the scope of Xcentric's contacts with EASI and Tennessee. The issue is not, as Xcentric argues, whether EASI can prove its case before taking any discovery. In essence, Xcentric presents arguments under four different procedural rules — Rules 11, 12(b)(2), 12(b)(6) and 56 — when responding to EASI's request for discovery.[1] Put another way, Xcentric's response to EASI's request for discovery is simply another request to dismiss the case before any discovery has been taken.

As explained in EASI's Response to Xcentric's Motion to Dismiss for Lack of Personal Jurisdiction (Doc. No. 25), the record amply supports this Court's exercise of both specific and general personal jurisdiction. Nonetheless, discovery would disclose the full extent of Xcentric's contacts with EASI and Tennessee. Discovery would also aid EASI in rebutting the factual claims Xcentric has made through documents filed in support of its Motion to Dismiss, which Xcentric now portrays curiously as "requir[ing] no vetting of the facts." (Doc. No. 31 at 1.) For example, as explained below, some of the "testimony" provided in a declaration is demonstrably false. EASI is entitled to take discovery on that "evidence."

Accordingly, the Court should grant EASI's motion to lift the stay on discovery for the limited purpose of discovering jurisdictional facts.

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[1] Though styled a Motion to Dismiss for Lack of Personal Jurisdiction, Xcentric is essentially moving for summary judgment before any discovery has taken place. Indeed, Xcentric's Response to EASI's Motion to Lift the Stay on Discovery relies on the summary judgment standard – that EASI cannot establish liability "under these uncontested facts." (Doc. No. 31 at 2.)

II. ARGUMENT

A. This Court Should Permit Discovery on Xcentric's Contacts with EASI and Tennessee.

This is a discovery motion, not a motion to dismiss for failure to state a claim or a summary judgment motion. EASI seeks discovery to determine the full extent of Xcentric's contacts with Tennessee, including those based on the following activities:

- Soliciting and receiving donations;
- Offering for sale a book called the "Rip-off Revenge Guide";
- Offering individuals the prospect of compensation for submitting reports;
- Recommending tactics for complainants to follow in crafting reports;
- Helping organize lawsuits, including class action litigation;
- Offering for sale the so-called "Rip-off Report Corporate Advocacy Business Remediation & Customer Satisfaction Program";
- Assisting complainants in obtaining media attention; and
- Selling advertising space on the website.

These activities are relevant, at a minimum, to the issue of general jurisdiction — an issue Xcentric does not even address in its Response.

Xcentric's argument focuses instead on specific jurisdiction. Discovery would also be useful in learning the full extent of Xcentric's contacts with EASI, including:

- Editing and publishing complaints concerning EASI;
- Actively soliciting, encouraging and receiving "reports" from Tennesseans, who purportedly wrote some "reports" about EASI;
- Creating and developing original content on the website concerning EASI;
- Communicating directly with Tennessee residents about EASI; and
- Communicating directly with persons Xcentric knew would make libelous posts about EASI, a Tennessee company.

In response to EASI's request for discovery, Xcentric asks this Court to decide the jurisdictional motion (and dismiss the suit) on the current record. If the Court does not permit discovery, EASI must carry only a "relatively slight" burden of "a *prima facie* showing that personal jurisdiction exists." Am. Greetings Corp. v. Cohn, 839 F.2d 1164, 1169 (6th Cir. 1988); Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991). EASI has already carried that burden. In response to Xcentric's Motion to Dismiss, EASI filed a wealth of evidence demonstrating Xcentric's significant contacts with EASI and Tennessee, including a declaration, numerous emails, citations to Xcentric's website and citations to case law addressing the similar conduct of the website's operators in other cases.[2]

Xcentric's denial of EASI's substantive allegations has no impact on the issue of personal jurisdiction at this early procedural stage. When adjudicating a jurisdictional motion where there has been no opportunity for discovery, "the court will not consider or weigh the controverting assertions of the defendant." Kelly v. Int'l Capital Res., Inc., 231 F.R.D. 502, 509 (M.D. Tenn. Nov. 9, 2005) (Trauger, J.).

The reason for this rule is clear: a party's mere denial of liability "cannot suffice to defeat personal jurisdiction, because that result would effectively repeal the long-arm statute." Kevin M. Clermont, Jurisdictional Fact, 91 Cornell L. Rev. 973, 976 (2006); see also Kelly v. Int'l, 231 F.R.D. at 509 n.7. Such a result "would be to make the jurisdiction of the court depend upon the outcome of a trial on the merits." Hanson v. Murphy, 491 P.2d 551, 555 (Kan. 1971) (quoting with approval Nelson v. Miller, 143 N.E.2d 673, 680 (Ill. 1957)). Such an outcome is clearly improper.

B. Even If the Court Weighs the Evidence to Determine the Merits of the Case Before Discovery Has Been Allowed, Xcentric's Arguments Fail.

Xcentric's summary denials that it "authored" content about EASI are, as a matter of law, insufficient to establish immunity under the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"). The very words of the statute belie Xcentric's position: the CDA does not immunize the "creation ***or development***" of content. 47 U.S.C. § 230(f)(3) (emphasis added); Carafano v. Lycos, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003) (CDA does not immunize "creating, developing or 'transforming'" content). Indeed, courts have repeatedly ruled against the operators of the very same website precisely on this ground – holding, in the context of a 12(b)(6) motion, that actions, such as encouraging complainants to submit certain photographs, are not immunized by the CDA and constitute "participating in the process of developing information."[3] MCW, Inc. v. Badbusinessbureau.com, LLC, No. 3:02-CV-2727-G, 2004 U.S. Dist LEXIS 6678, at **34-35 (N.D. Tex. Apr. 19 2004) (copy attached to Doc. No. 25); see also Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005). This case is no different. (See, e.g., Doc. No. 25 at 18.)

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[2] Xcentric's argument that no disputed facts exist because EASI has not submitted any "affidavits" is misguided. The Sixth Circuit has expressly held that a nonmoving party may establish jurisdiction "by affidavit ***or otherwise***." Theunissen, 935 F.2d at 1458 (emphasis added); accord Kelly v. Int'l, 231 F.R.D. at 508; 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (3d ed. 2004) ("affidavits and other written evidence"). EASI has done so.

Xcentric requests – in response to a discovery motion – that this Court accept as true its averments and dismiss the case based primarily on the declaration of Ed Magedson. Magedson's declaration, however, contains assertions that are, at the least, overstated. Magedson states that "the first time I learned of EASI was in May 2006" (Magedson Decl. ¶ 25) despite having repeated communications with at least one person concerning EASI three years earlier (Doc. No. 25, Exh. D). Magedson further states that EASI's allegation that Defendants sell the "Rip-Off Revenge Guide" is "entirely untrue." (Magedson Decl. ¶ 21.) Yet, his company's website conspicuously advertises that the book is "From the founder of Rip-Off Report.com," i.e. Magedson, the founder of the Website and Xcentric. (Rip-off Report.com, Revenge Guide, at http://www.ripoffreport.com/revengead.htm (last visited April 5, 2007)); (Rip-off Report.com, Home Page, at http://www.ripoffreport.com/default.asp (last visited April 7, 2007).)

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[3] Xcentric further persists in misrepresenting that EASI claims that only one person authored content about EASI. (Doc. No. 31 at 2.) The Amended Complaint alleges otherwise (Doc. No. 15 ¶ 12, 26-27). Xcentric fails to address its authorship of various headings, including the categories "corrupt companies" and "con artists" linked to EASI and the moniker listed above every entry concerning EASI: "Don't let them get away with it. Make sure they make the Rip-off Report!" (E.g., Doc. No. 19 at 2-3.)

Magedson also states that "in the past several years, Xcentric has been sued approximately 20 times, and it has never lost a single case. It has never paid money to a Plaintiff in settlement or otherwise . . . ." (Magedson Decl. ¶ 32 (emphasis in original).) Not disclosed is that a court in the Caribbean rendered judgment against Xcentric's sister entity Badbusinessbureau.com, LLC in the amount of approximately $10,000,000. See "Badbusinessbureau.com Ordered to Pay $10 Million in Damages to Aylon Technologies," PR Newswire Ass'n (Aug. 25, 2003) (available at Lexis.com) (copy attached). Moreover, according to Magedson "Rip-Off Report never removes reports from the website" (Magedson Decl. ¶¶ 26-27), even though an Illinois district court ordered Defendants to remove postings and sanctioned Defendants prior to the case settling. See George S. May v. Xcentric Ventures, No. 04-C-6018, Doc. No. 78 (N.D. Ill. Sept. 13, 2005); id. at Doc. No. 207 (Dec. 14, 2006) (copies attached).

Regardless of the veracity of the declaration, EASI is entitled to take discovery to address any questions the Court may have on the issue of personal jurisdiction or the merits of this case. See Plott v. Gen. Motors Corp., Packard Elec. Div., 71 F.3d 1190, 1195 (6th Cir. 1995) ("Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case."). If the Court engages in an analysis of the merits of the case, EASI would be entitled to move under Rule 56(f) for the opportunity to take discovery.

III. CONCLUSION

For the foregoing reasons, the Court should grant EASI's Motion to Lift the Stay on Discovery for the Limited Purpose of Discovering Jurisdictional Facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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this 16th day of May, 2007.

s/ W. Russell Taber